

United States District Court

Western DISTRICT OF OKLAHOMA

APPLICATION TO PROCEED IN FORMA PAUPERIS, SUPPORTING DOCUMENTATION AND ORDER

United States v. BARRY DEAN BISCHOF

CASE NUMBER: CR-07-154-D

FILED

MAY 27 2009

I, BARRY DEAN BISCHOF declare that I am the (check appropriate box)
 U.S. DIST. COURT, WESTERN DIST. OF OKLA.
 BY ROBERT D. DENNIS, CLERK
☒ petitioner/plaintiff ☐ movant (filed as U.S.C. 2255 motion)
☐ respondent/defendant ☒ NOTICE TO APPEAL "NUNC PRO TUNC"
 other

in the above-entitled proceeding; that, in support of my request to proceed without being required to prepay fees, cost or give security therefor, I state that because of my poverty, I am unable to pay the costs of said proceeding or give security therefor; that I believe I am entitled to relief. The nature of my action, defense, or other proceeding or the issues I intend to present on appeal are briefly stated as follows:

Entitled to a Direct Appeal & NOTICE pursuant to
 F.R. crim. P. 32 (a)(2) NOW (c)(5)

In further support of this application, I answer the following questions.

1. Are you presently employed? Yes ☐ No ☒
 - a. If the answer is "yes," state the amount of your salary or wages per month, and give the name and address of your employer. (list both gross and net salary)
 - b. If the answer is "no," state the date of last employment and the amount of the salary and wages per month which you received.
 Been in Prison past 16 years, don't recall
2. Have you received within the past twelve months any money from any of the following sources?
 - a. Business, profession or other form of self-employment Yes ☐ No ☒
 - b. Rent payments, interest or dividends? Yes ☐ No ☒
 - c. Pensions, annuities or life insurance payments? Yes ☐ No ☒
 - d. Gifts or inheritances? Yes ☐ No ☒
 - e. Any other sources? Yes ☐ No ☒

**AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS***

I, BARRY DEAN BISCHOF, am the petitioner in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	Average monthly amount during the past 12 months		Amount expected next month	
	You	Spouse	You	Spouse
Employment	\$ <u>0</u>	\$ _____	\$ <u>0</u>	\$ _____
Self-employment	\$ <u>0</u>	\$ _____	\$ <u>0</u>	\$ _____
Income from real property (such as rental income)	\$ <u>0</u>	\$ _____	\$ <u>0</u>	\$ _____
Interest and dividends	\$ <u>0</u>	\$ _____	\$ <u>0</u>	\$ _____
Gifts	\$ _____	\$ _____	\$ <u>0</u>	\$ _____
Alimony	\$ <u>0</u>	\$ _____	\$ <u>0</u>	\$ _____
Child Support	\$ <u>0</u>	\$ _____	\$ <u>0</u>	\$ _____
Retirement (such as social security, pensions, annuities, insurance)	\$ <u>0</u>	\$ _____	\$ <u>0</u>	\$ _____
Disability (such as social security, insurance payments)	\$ <u>0</u>	\$ _____	\$ <u>0</u>	\$ _____
Unemployment payments	\$ <u>0</u>	\$ _____	\$ <u>0</u>	\$ _____
Public-assistance (such as welfare)	\$ <u>0</u>	\$ _____	\$ <u>0</u>	\$ _____
Other (specify): _____	\$ <u>0</u>	\$ _____	\$ <u>0</u>	\$ _____
Total monthly income:	\$ <u>0</u>	\$ _____	\$ <u>0</u>	\$ _____

	You	Your spouse
Transportation (not including motor vehicle payments)	\$ <u>0</u>	\$ _____
Recreation, entertainment, newspapers, magazines, etc.	\$ <u>0</u>	\$ _____
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	\$ <u>0</u>	\$ _____
Life	\$ <u>0</u>	\$ _____
Health	\$ <u>0</u>	\$ _____
Motor Vehicle	\$ <u>0</u>	\$ _____
Other: _____	\$ <u>0</u>	\$ _____
Taxes (not deducted from wages or included in mortgage payments)		
(specify): _____	\$ <u>0</u>	\$ _____
Installment payments		
Motor Vehicle	\$ <u>0</u>	\$ _____
Credit card(s)	\$ <u>0</u>	\$ _____
Department store(s)	\$ <u>0</u>	\$ _____
Other: _____	\$ _____	\$ _____
Alimony, maintenance, and support paid to others	\$ <u>0</u>	\$ _____
Regular expenses for operation of business, profession, or farm (attach detailed statement)	\$ <u>0</u>	\$ _____
Other (specify): _____	\$ <u>0</u>	\$ _____
Total monthly expenses:	\$ <u>0</u>	\$ _____

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
N/A			\$
			\$
			\$

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
			\$
			\$
			\$

4. How much cash do you and your spouse have? \$
Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial institution	Type of account	Amount you have	Amount your spouse has
		\$	\$
		\$	\$
		\$	\$

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

<input type="checkbox"/> Home Value _____	<input type="checkbox"/> Other real estate Value _____
<input type="checkbox"/> Motor Vehicle #1 Year, make & model _____ Value _____	<input type="checkbox"/> Motor Vehicle #2 Year, make & model _____ Value _____
<input type="checkbox"/> Other assets Description _____ Value _____	

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
_____	\$ _____	\$ _____
_____	\$ _____	\$ _____
_____	\$ _____	\$ _____

7. State the persons who rely on you or your spouse for support.

Name	Relationship	Age
_____	_____	_____
_____	_____	_____
_____	_____	_____

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

	You	Your spouse
Rent or home-mortgage payment (include lot rented for mobile home)	\$ <u>0</u>	\$ _____
Are real estate taxes included? <input type="checkbox"/> Yes <input type="checkbox"/> No		
Is property insurance included? <input type="checkbox"/> Yes <input type="checkbox"/> No		
Utilities (electricity, heating fuel, water, sewer, and telephone)	\$ <u>0</u>	\$ _____
Home maintenance (repairs and upkeep)	\$ <u>0</u>	\$ _____
Food	\$ <u>0</u>	\$ _____
Clothing	\$ <u>0</u>	\$ _____
Laundry and dry-cleaning	\$ <u>0</u>	\$ _____
Medical and dental expenses	\$ <u>0</u>	\$ _____

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

☐ Yes

☒ No

If yes, describe on an attached sheet.

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? ☐ Yes ☒ No

If yes, how much? _____

If yes, state the attorney's name, address, and telephone number:

11. Have you paid—or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

☐ Yes

☒ No

If yes, how much? _____

If yes, state the person's name, address, and telephone number:

12. Provide any other information that will help explain why you cannot pay the costs of this case.

Been in Prison 16 years

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: _____, 20____

(Signature)

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PRO SE DOCKETING STATEMENT

INSTRUCTIONS: Appellant must complete the entire docketing statement form and attach copies of the following documents: (1) the notice of appeal; (2) the order or judgment being appealed; and (3) any written findings, conclusions or order of the trial court relating to the order of judgment being appealed. The completed docketing statement, together with the attachments, must be filed with the clerk of the court of appeals within 10 days after filing the notice of appeal. A copy of the completed docketing statement, with attachments, must be served on all opposing parties or their counsel. Proof of service must be provided. You must complete the certificate of service which is part of this form.

1. Your name, address, including registration number if applicable: BARRY DEAN BISCHOF 24501-077 FCC VICTORVILLE - USP
P.O. BOX 5300, Adelanto, CA. 92301
2. Title and number of district court case: UNITED STATES V. BARRY
DEAN BISCHOF CR-07-154-D
3. Name of the district court: Western District of Oklahoma
4. The dates on which the district court order and your notice of appeal were filed:
MAY 4, 2009
5. Type of action:
☐ habeas corpus
☐ § 2255 motion
☐ motion to reduce sentence
☐ civil action for damages
☒ other [specify] NUNC PRO TUNC MOTION for direct appeal

6. State briefly the relief you requested in the district court and the reasons why you are entitled to such relief: My statutory right to Direct Appeal,
NUNC PRO TUNC, granted by Congress 18 USC 3742(a)(1)(2)

7. State briefly the reasons why you feel the decision of the district court should be reversed: To preserve my right to direct appeal

8. Did you have a hearing in the district court? NO

Signature

Bany Dean Gidley

Date

CERTIFICATE OF SERVICE

I, BARRY DEAN BISCHOF hereby certify that on
[appellant/petitioner]

I sent a copy of the foregoing Pro Se Docketing Statement,
[date]

to:

Robert D Dennis, Clerk of Court, at 200 N.W. 4th Street, Rm 1210
[appellee/respondent or attorney therefor]

Oklahoma City, Oklahoma 73102

_____, the last known address,
by way of United States mail or courier.

Signature Benny Dean Bunting

5/13/09
Dated signed

BARRY DEAN BISCHOF 24501-077

FCC VICTORVILLE - USP

P. O. Box 5300

Adelanto, CA 92301

[Printed name and address of person completing service]

BARRY DEAN BISCHOF
#24501-077
USP VICTORVILLE
P.O. BOX 5300
ADELANTO, CALIFORNIA 92301

FILED

MAY 04 2009

ROBERT D. DENNIS, CLERK
DIST. COURT, WESTERN DIST. OF OK
BY DEPUTY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

BARRY DEAN BISCHOF
Defendant,
vs.
UNITED STATES OF AMERICA,
Plaintiff,

Case No. CR-07-154-D
"NOTICE OF APPEAL"
"Nunc Pro Tunc"
Via 18 USC § 3742 (a)(1)(2)

Now Comes; defendant Bischof and does hereby gives this "NOTICE TO APPEAL Nunc Pro Tunc" a statutory right under Title 18 United States Code Section 3742(a)(1)(2) an illegal sentence or one imposed in violation of the sentencing guidlines etc.

"Stare Decisis"

Cite: Roe v. Flores-Ortega, 528 U.S. 470 (2000)
Peguero v. United States Supra, 526 U.S. at 29-30

"CAUSE AND PRJUDICE"

1) The sentencing Judge DeGiusti failed to follow the dicta limned in Federal Rules of Criminal Procedure 32(a)(2) now (c)(5), to protect defendant Bischof's statutory right to appeal an illegal sentence under 18 USC §3742(a)(1)(2).

Congress made 18 USC §3742 (a)(1)(2) the "Exclusive Avenue" in which a defendant may adjudicate any and all sentencing guideline claims, if these claims are not addressed on appeal they are waived, forfeited from adjudication under 28 USC §2255.

2) Ineffective Counsel failed to properly file a timely "Notice To Appeal A Sentence" and did not consult with defendant Bischof on any claims to be

addressed on direct appeal of an illegal sentence, this cause defendant to receive a 14 year sentence.

Wherefore; counsel was ineffective under Cite: Paul Glover v. United States, 162 L.Ed2d 480 (2001).

"CLAIMS"

1) Defendant Bischof is entitled to effective assistance of counsel on his first appeal of a criminal conviction and its sentence. The right to effective counsel is denied where the Attorney failed to follow defendant's request and instructions.

The Supreme Court has applied the general rule where, as here, the appellate/defense lawyer failed to follow the directions to appeal by a defendant. In [Roe v. Flores-Ortega, 528 U.S. 470 (2000) and [Peguero v. United States supra, 526 U.S. at 29-30, the court held that counsel has a duty to consult with the defendant about whether to appeal, when there is a reason to think that a reasonable defendant with a court imposed 14 years sentence would want to appeal, or when the particular defendant has demonstrated his desire to press forward with any available appeal in his case if possible.

Where such circumstances are present, and those circumstances cause the defendant to lose the valuable right to appeal, [Roe v. Flores-Ortega] holds that counsel is ineffective and the client is prejudiced, No further proof of meritorious issues that might have been raised on appeal is necessary, to prove such a claim.

2) Defendant Bischof is entitled to the benefit of the holding of [Roe v. Flores-Ortega: The federal Court's are unanimous in holding that it is not a new rule, but an application of "Strickland v. Wahington, 466 U.S. 668(1984). This 10th Circuit has followed other circuits that have allowed the filing of an "out of time appeal".

"IN CONCLUSION"

For all the foregoing reasons, and the fact that defendant Bischof has been moved around from place to place without his legal work or property with

to even find out what the attorney had done (even the court was unable to contact him as shown in Docket sheet) (see exhibit 1) , this "Notice To Appeal Nunc Pro Tunc" should be granted in the interest of justice, and to follow The United States Supreme Court's dicta's as presented.

Will this court hereby grant this request to protect defendant's statutory right to appeal given to all defendants by Congress?

Signed, dated and mailed
April 27, 2009

Respectfully Submitted;


Barry Dean Bischof

		58 Notice (Other) filed by Russell Dean Landers, <u>113</u> Notice (Other) filed by Barry Dean Bischof, 140 Notice (Other) filed by Russell Dean Landers, 179 Notice (Other) filed by Russell Dean Landers, 129 Notice (Other) filed by Russell Dean Landers, 127 Notice (Other) filed by Russell Dean Landers, 73 Notice (Other) filed by Russell Dean Landers, 148 Notice (Other) filed by Russell Dean Landers, 145 Notice (Other) filed by Russell Dean Landers, <u>26</u> Affidavit filed by Barry Dean Bischof, 85 Notice (Other) filed by Clayton Heath Albers, 142 Notice (Other) filed by Russell Dean Landers, <u>112</u> Notice (Other) filed by Barry Dean Bischof, 155 Notice (Other) filed by Russell Dean Landers, 130 Notice (Other) filed by Russell Dean Landers, 86 Notice (Other) filed by Clayton Heath Albers, 159 Notice (Other) filed by Clayton Heath Albers, 128 Notice (Other) filed by Russell Dean Landers, <u>138</u> Notice (Other) filed by Barry Dean Bischof, 171 Notice (Other) filed by Russell Dean Landers, 55 Notice (Other) filed by Russell Dean Landers. Defendants are directed to cease filing frivolous documents into the record of this case. Order More Fully Setout. Signed by Honorable Timothy D. DeGiusti on 4/2/2008. (mb,) (Entered: 04/02/2008)
04/16/2008	<u>210</u>	RETURN OF SERVICE - NON SUMMONS Request of US Atty for Prod of Fed Prisoner Barry Dean Bischof by United States of America; returned to FTC 4/15/08 (ap,) (Entered: 04/16/2008)
04/28/2008		Attorney update in case as to Barry Dean Bischof. Attorney Larry W Tedder terminated. (mb,) (Entered: 04/28/2008)
04/28/2008		(Court only) ***Staff notes: Larry Tedder terminated due to not having a valid e-mail address for notices. (mb,) (Entered: 04/28/2008)
05/13/2008	<u>229</u>	USCA Case Number as to Russell Dean Landers, Clayton Heath Albers, Carl Ervin Batts, Barry Dean Bischof, William Michael Roberson 08-6105 for 209 Notice of Appeal filed by Russell Dean Landers. (cjs,) (Entered: 05/13/2008)
09/10/2008	<u>251</u>	NOTICE OF APPEAL by Barry Dean Bischof (cjs,) (Entered: 09/10/2008)
09/10/2008	<u>252</u>	Transmission of Notice of Appeal as to Barry Dean Bischof to US Court of Appeals re <u>251</u> Notice of Appeal (cjs,) (Entered: 09/10/2008)

Exhibit 1